

4375

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EZRA ALLEN,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

Brief of Defendant-Appellant

THOMAS MANNIX, Counsel for Appellant.

E. V. LITTLEFIELD, Counsel for Respondent.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EZRA ALLEN,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

BRIEF OF DEFENDANT-APPELLANT.

This is the case of the United States of America vs. Ezra Allen, charging him with having sold three pints of whisky to a Government agent. It appears that Ezra Allen is a cab driver at La Grande, Oregon, and has been for some years. On Labor Day the Government agents, for want of something better to do, decided to entrap Ezra

Allen and arrest him for violating the Volstead Act. The Government conspirators got together and one of them gave one Pierce, who was not an agent at that time, some marked money, and he approached the defendant Allen, and asked him, as the record shows, where he could buy some whisky and whether he would buy some whisky. The evidence shows that Allen was not engaged in bootlegging and there is no evidence to show that he was ever connected either directly or indirectly with the whisky trade. However, in order to accommodate the Government agent he took the marked money and procured a pint of whisky and later on the same day further accommodated the agents and procured another pint. Later on the Government conspirators having incited Ezra Allen to buy the whisky and having made him their agent for that purpose, arrested him for their own act. The entire evidence is before the Honorable Circuit Court of Appeals, and it can be ascertained from the evidence that these are the facts.

The question in the case is whether or not Government agents can solicit and incite the commission of a crime and then arrest and convict their dupe. The leading case on the subject in this District which seems to settle the law is Peterson vs. United States, 255 Federal 433 before the Honorable Circuit Judges Gilbert, Ross and Hunt. These Federal Judges speaking through Circuit Judge Ross said:

“It is the settled rule in this Circuit that where officers of the law have incited a person to commit the crime charged, and lured him on with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty.”

If this be the legal major premise, the entire record will show that Ezra Allen was the victim of the over-zealousness of these officers to get the victim irrespective of either law or ethics.

The following cases will throw some further light on the legal aspects of this case:

Intoxicating liquors; is one who obtains liquor for and delivers it to another using the latter's money, guilty of selling the same.

As shown by the following cases, as well as those cited in the note to *Reed v. State*, 24 L. R. A. (N. S.) 268, to which this note is supplemental, the general rule is that one, who, at the request of another and with money furnished for that purpose by him, purchases from a third person, and delivers to the former, intoxicating liquors, is not guilty of making a sale, as he acts merely as agent for the real purchaser, unless it appears that he is personally interested in the sale or acts for the seller.

Reynolds v. State, 52 Fla. 409.

State v. Turner (Kan.), 109 Pac. 983.

Givens v. State, 49 Tex. Crim. Rep. 267, 91 S. W. 1090.

Killman v. State, 53 Tex. Crim. Rep. 512, 112 S. W. 90.

Schoennerstedt v. State, 55 Tex. Crim. Rep. 638, 117 S. W. 829.

Lafrentz v. State (Tex. Crim. Rep.), 125 S. W. 32.

On proof of unimpeachable witnesses that the defendant received money from another person, accompanied by a request to procure whisky with it, which he bought from a third person and delivered as requested, the defendant cannot be convicted of having on hand intoxicating liquor for the purpose of illegal sale.

Bray v. Commerce, 5 Ga. App. 605, 63 S. E. 596.

So, where the defense to a charge of violating the prohibition liquor law is that the defendant purchased intoxicating liquors for those who advanced him money for that purpose, and that he acted merely as their agent, it is error to refuse to instruct the jury to acquit the defendant if they believe the evidence in support of such defense.

State v. Turner, *supra*.

But a *prima facie* case of a violation of a prohibitory liquor law is made by evidence that the defendant was requested by other persons to procure liquor for them, receiving money from them therefor, which he shortly afterwards delivered to them, as the burden of explaining where and from whom he obtained the liquor rests upon the defendant. In this case the evidence shows that Ezra Allen received the whisky from a man and turned the same over immediately to the Government agent.

A conviction for an illegal sale in a district where the sale of liquor is prohibited cannot be sustained on proof that the defendant, at the request of and with money furnished by a third person, purchases liquor for, and delivers it to, the latter within such district, as such facts show that the defendant was merely agent for the purchases, and was not the seller or agent of the seller.

Dubois v. State, 87 Ala. 101.

People v. Converse, 157 Mich. 29.

Tate v. State, 91 Miss. 382.

State v. Lynch, 81 Ohio St. 343.

State v. Wirick, 81 Ohio St. 343.

Way v. State, 36 Tex. Crim. Rep. 40.

Brignon v. State, 37 Tex. Crim. Rep. 71.

Phillips v. State (Tex. Crim. Rep.) 40.

Kirby v. State, 46 (Tex. Crim. Rep.) 584.

Dupree v. State (Tex. Crim. Rep.) 91.

The following instruction was asked by defendant which was refused, and we submit that the refusal was error.

“It is not unlawful for one person to act as the agent of another in purchasing intoxicating liquors. So that if you should find that the defendant has only acted for and as the agent of some person or persons wishing to purchase intoxicating liquors, and that the defendant was given the money with which to pay for the intoxicating liquors desired, and that he simply took the money and delivered it to a person who had intoxicating liquors for

sale, and purchased the intoxicating liquors with the money which had been given him and then delivered the intoxicating liquors so purchased to the person who gave him the money, and who instructed him to purchase the liquors for him, then you cannot find the defendant guilty, for such acts would not be in violation of the law."

We submit to the Honorable Circuit Court of Appeals that the violation of all law should be punished with equal zeal, and one crime should not be selected for punishment more than another. True, the Volstead Act ought to be enforced with the utmost energy, but so should all other criminal laws be equally enforced, and yet many courts and persons interested in the enforcement of the criminal law believe at the present time that law enforcement means merely the enforcement of the provisions of the Volstead Act. Whereas a person who is not carried away with the clamor of the moment realizes that the enforcement of every law should receive equal attention because it is no worse to sell a bottle of whisky than it is to burn a house. If Ezra Allen had been a bootlegger, then it would have been proper to entrap him, but being a cab driver and not dealing in liquor, the case is entirely different and brings the legal solution of this case within the principle enunciated in the Peterson case. Government sleuths should not be allowed to employ stool-pigeons to purchase liquor for their own accommodation and then turn the tables by ar-

resting the innocent party. As a matter of fact, there is evidence in this case that the Government sleuths drank some of this whisky themselves, and supposedly this is a crime in itself. We do not know that the prohibition law discriminates in favor of prohibition agents and allows them to drink whisky while prohibiting it to others. Defendant should not be held in this case because the commission of the act was the direct result of the Government agents requesting Ezra Allen to purchase the liquor. There is room enough for legitimate prohibition work without the inciting to law violation.

Respectfully submitted,

THOMAS MANNIX,
Attorney for Appellant.

